

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
FIRST REGION**

In the Matter of

WLVI INC.

Employer¹

and

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL 1228,
AFL-CIO

Union-Petitioner

Case 1-UC-837

DECISION AND CLARIFICATION OF BARGAINING UNIT²

The Employer is a television station located in Boston, Massachusetts, and is engaged in the production and broadcast of news, public service, and entertainment television programs. The Petitioner, Local 1228, seeks to accrete a newly created job classification of video journalist to its existing bargaining unit.³ Currently, there is only one video journalist, Adam Chodak. The Union maintains that the video journalist is a dual-function employee who, under traditional community of interest standards as applied to dual-function employees, should be included in the unit. The Employer maintains that the non-exclusive jurisdiction clause in the parties' current collective-

¹ The name of the Employer appears as amended at the hearing.

² Upon a petition duly filed under Section 9(b) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board. In accordance with the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the Regional Director.

Upon the entire record in this proceeding, I find that: 1) the hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed; and 2) the Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this matter.

³ The unit represented by the Petitioner consists of all technicians and engineers employed by the Employer including all broadcast technicians, crew chiefs, and technician supervisors. There are 50 employees in the current unit.

bargaining agreement, discussed below, privileged it to create the video journalist classification as a non-unit position that performs some bargaining unit functions. I find that the non-exclusive jurisdiction clause in the parties' current contract does not privilege the Employer to create the video journalist classification as a non-unit position, and that the video journalist is not sufficiently dissimilar from the unit employees as to preclude his inclusion in the unit. Rather, I find that the video journalist shares a substantial community of interest with the photographers and editors in the bargaining unit, such that he must be included in the unit.

BACKGROUND

Local 1228 has represented a unit of the Employer's employees as set forth in successive collective-bargaining agreements between the parties since at least 1986. The current contract is in effect from January 1, 2005 to December 31, 2008. Included in this collective-bargaining agreement is a jurisdiction clause that defines the scope of the unit by the type of work that is performed.⁴ In addition to the scope of the unit being defined by the type of work performed in the jurisdiction clause, the parties' current collective-bargaining agreement contains a "non-exclusive jurisdiction" clause that allows the Employer to assign unit work to non-unit employees.⁵ As noted above, the Employer

⁴ Section 1. ASSIGNMENT OF WORK

- (a) The work covered shall be work commonly performed by Technicians such as work in connection with the installation, operation, maintenance and repair of broadcast, television, and audio equipment and apparatus by means of which electricity is applied in the transmission or transference, production or reproduction of voice, sound, or vision with or without ethereal aid, including all types of recordings.
- (b) This also includes all lighting work and studio and field operations work incidental to and necessary to television and audio, video and optical recording work and all still and motion picture photography, film processing, development, editing, splicing and projection work performed for the Employer.
- (c) Work commonly performed by Technicians shall also include the work of building, maintenance, repair, placement, and any operation in connection with television performances of backgrounds, platforms, and other structures forming a part of the scenery or the set picked up by the cameras, and also parallels or platforms used to raise or set cameras upon; lighting devices used to light the television sets and/or performers; properties used on set picked up by the camera, including the handling of all cards and displays used in the studio and on remote pickups; handling lighting on field pickups; procuring properties and performing construction work.
- (d) The foregoing describes covered work, which are those functions that are commonly performed by Technicians, and whatever other work is assigned to the Technicians. All assignments shall be made at the sole discretion of the Employer, and the provisions of this Article V shall not be so construed as to restrict the Employer in making assignments of responsibilities, work and/or functions to Technicians or others out of the Bargaining Unit, as the Employer determines to be in its best interests.

⁵ Section 2. Non-Exclusive Jurisdiction Clause

It is further understood and agreed that the Employer's assignments of responsibilities, work and/or functions to Technicians described in this Article shall not be construed as granting

contends that this clause allowed it to create the video journalist classification as a non-unit position that performs some bargaining unit functions, while the Union asserts that the non-exclusive jurisdiction clause does not preclude it from seeking to clarify the unit when new positions are created, and further contends that the video journalist is a dual-function employee who, under traditional community of interest standards as applied to dual-function employees, should be included in the unit.

FACTS

The employees in the bargaining unit include photographers and editors, who work together with non-unit reporters, writers, producers, production assistants, and anchors to broadcast the 10:00 p.m. news on WLVI. The news director, who handles the day-to-day and long term operations of the news department and supervises all employees, is Pamela Johnston. There are five reporters, four anchors, two weather anchors, two sports personnel,⁶ one sports anchor, and one part-time sports anchor who do the 10 o'clock news.

Reporters and Photographers

Work performed in the field

The reporters work “dayside” or “nightside” schedules. The video journalist position at issue here is a dayside position.⁷ A typical day for dayside reporters collecting and broadcasting the news starts with the morning meeting at 9:30 a.m. Their arrival time is flexible as long as they are present for the morning meeting. This is also true for Adam Chodak, the video journalist, although he usually arrives by about 8:45 a.m.. The reporters and the video journalist are required to attend the morning meeting, where they receive their assignments for the day. The photographers are welcomed to attend the morning meeting, but their attendance is rare. At the morning meeting, the participants are expected to “enterprise,” or pitch, a story idea that they have come up with and wish to pursue. Some days their story suggestion will be selected to pursue, sometimes it will be shelved for a later date, and sometimes a more important story will take precedence. Typically, the morning meeting lasts about one-half hour and at the end of it, the reporters get their assignments for the day, which involve going out with a photographer to cover a story.

Technicians exclusive jurisdiction over any such responsibilities and/or functions. The Employer, in its sole discretion, may assign particular work or functions to the Technicians or to others, including outside contractors, not covered by this Agreement. The assignment of work or functions to the Technicians shall not be deemed to confer exclusive jurisdiction over the same to the Technicians, the Employer having the right to determine at any time to whom such work or functions should be assigned.

⁶ This term was not defined.

⁷ Johnston testified that the video journalist’s schedule is treated like a reporter’s schedule. The photographers and editors in the bargaining unit are scheduled by the chief photographer, and the schedules are approved by the chief engineer.

A photographer receives his assignments for the day from the assignment desk. These assignments can include, in addition to teaming up with a reporter, voiceovers (VO), or voiceover sound on tape (VOSOT). A voiceover on the news is when video is shown with the anchor's voice heard speaking about the video, which was taken by the photographer. A VOSOT is the same as a VO, except the anchor pauses his narration to let an audio portion of the video clip, usually a statement from an interviewee, play. In this case, it is the photographer who has asked the questions of the interviewee. When a photographer does a VO or VOSOT, the assignment desk usually provides guidance or instructions to the photographer regarding who to interview and what questions to ask.⁸

If his idea is not accepted for the day, or he is out of ideas, like the photographers, Chodak will get his assignment from the assignment desk. Like the reporters, Chodak is expected to develop a "package"⁹ for the news each night, five nights a week. Other reporters are expected to do two or three packages each day, but Chodak is only responsible for one. A traditional package would be prepared by a reporter and a photographer, and would last for about 90 seconds.

Work performed at the station

When the reporter and photographer return to the station from covering a story, the reporter prepares the script for his story. He will look at the videotape the photographer shot, handwrite out the time codes for when sound bites that he wants to use occurred on the tape, and then he will enter this on the computer. In addition, he will compose the actual wording for the script.

All scripts have to be reviewed and approved by a producer, assistant news director, or news director, depending on who is on the floor at the time. They can suggest changes to the script, and once they approve the script, they print it out and give it to the reporter to do the voiceover. The reporters actually do the voiceovers in the editing suites, where the bargaining unit editors work. The editors work on linear editing machines.¹⁰ They take the videotape, something called a record tape, and something called a shuttle, and then they cut these and put them together onto a single tape, using instructions written by the reporter to guide the editing. A traditional reporter writes very specific editing instructions on their script for the editor to follow. The "v-roll," or video that is seen over the audio, is logged line by line on the script so that the editor knows what the reporter wants it to look like line by line and second by second. While some reporters sit with the editors while the editors perform the actual editing work, other

⁸ The Employer tries not to send photographers out alone, but this does happen. The Employer would prefer to send an intern or producer out with the photographer.

⁹ A package is a reporter's story live or on tape that appears on the 10 o'clock news. The photographer shoots the video and the reporter appears in it, his voice is in it, he has written it, and, oftentimes, enterprised it at the morning meeting.

¹⁰ A linear editor edits a tape in a line, meaning that only one thing at a time can be edited.

reporters simply drop off their script and tapes with the editor and then leave for the day. The work performed by the editors, which they perform only on the reporters' packages, represents 40 to 50 percent of the stories that appear on the Employer's news shows. The remaining 50 to 60 percent of the stories presented on the Employer's news programs are edited by writers, producers, anchors, the assistant news director, and sometimes, the assignment editor, using a desktop computer program called "Clip Edit."

The Video Journalist

Work performed in the field

Chodak testified that one of the most critical aspects of his job is to enterprise a story at the morning meeting. He is expected to come up with and pitch ideas about stories he will pursue. If the assignment he receives at the morning meeting is not an idea that he pitched, he researches the story in the newspapers or the archives to familiarize himself with the background. Then, regardless of whether the assignment resulted from his pitch or not, he begins making telephone calls to people he wants to interview regarding the story. Due to lunch schedules and time constraints for completing a story, the telephone calling needs to be completed by about 11 a.m. so he can get to the location and begin interviewing. First, he gathers his equipment from the locker room, gets a set of keys for a vehicle, and then lets the assignment editor know what angle he is going to be working for the story. He uses a camera that is lighter and less expensive than that used by the unit photographers.¹¹ This camera can shoot high definition and digital video, although currently, he uses only the digital capability. He also uses a lightweight tripod and microphones that he carries in a small bag.

After gathering his equipment, Chodak leaves the station in a station-owned vehicle and drives to the interview location, during which time he thinks about the angle he is going to pursue for the story and the questions he is going to ask. Once at the interview location, he introduces himself to the interviewee, and then checks out the camera for things like white balance, focus, exposure, framing, tripod stability, and audio. This camera set-up takes about five minutes, and, as he does it, Chodak talks to the interviewee, asking questions that he is not going to be asking on camera, but may need for background, such as where the individual is from, how long he has worked at the particular place, and the like. There is an LCD on the camera that allows him to see how the picture is framed, and he uses that, along with a small ear microphone, while he sits down and questions the interviewee. However, if it is a rushed interview, he will hold the camera, omitting the tripod, and shoot the video "from the shoulder." After the interview, Chodak breaks down the camera, which only takes a few minutes, and, if needed, asks questions he does not want to get on camera. He usually tries to get two interviews into a package. In between the two interviews, he will record the "stand up" portion of his package. This is when the reporter stands in front of the camera alone and speaks, doing such things as a bridge, which would be inserted between the two

¹¹ His camera is a JVC HD100. Chodak testified that this camera is not intended for use by "pros," but is also not suitable for general consumers.

interviews, or a tag, which comes at the end of the story, or a tease, which is an introductory piece to the package that is broadcast immediately before a commercial break and is intended to keep the viewer interested in staying up to watch the story after the commercial. Chodak only needs to write out a script for the stand-up portion of the package in about one out of every ten packages that he does because it is usually not in-depth or complicated enough to require a pre-written piece.

Work performed at the station

When his field work is done, Chodak returns to the station to edit his tape. He tries to return by 2 p.m. At the station, Chodak edits the tape on the computer, using what is referred to as a non-linear editing system, much like the kind that people would use on their home computers to edit video tape they have taken. Currently, it takes Chodak 30 minutes to upload 30 minutes worth of video into the computer. Then, rather than having to record the time codes for sound bites as the other reporters do, Chodak simply hits a bookmark key to bookmark the sound bites in which he is interested and places them in whatever order he likes. He usually does this simultaneously with going on the ENPS, the Employer's electronic news gathering system, where all the scripts are kept. He uses this to set up a computer template for his package, which shows where the various sections of the package go, such as when a voiceover or stand up should occur. After about 30 minutes, he has the template completed, and the sound bites bookmarked and in the order he wants. This is the same function that is performed by the reporters, simply using different technology.

When the sound bites are entered into the template, and the template is completed, Chodak writes the script for the piece, which normally takes about 45 minutes to complete.¹² The script he is writing is for him to use to do the voiceovers that are necessary to complete the package. Then, after getting his script approved and printed, he goes to the editing suite to do his voiceovers. He uses a tape in his camera to do the voiceover audio, and then he feeds it into the computer and edits it the same way he edits the sound bites. Finally, he lays the video over the audio. When that is completed, he reviews the edited work to check the audio and for missed edits. The last thing Chodak does is feed the package into the news space.

ANALYSIS

The Employer asserts that the video journalist should not be included in the unit under the standard applied to clarification of bargaining units that are defined by the work performed, as set forth in *The Sun*, 329 NLRB 854 (1999). The Petitioner argues that the video journalist should be accreted into the unit because he is a dual-function employee who spends sufficient time performing bargaining unit work so as to give him "a substantial community of interest in the unit's wages, hours, and conditions of employment...." *Berea Publishing Co.*, 140 NLRB 516, 519 (1963). While I agree with

¹² Chodak explained that most reporters will write the script after the sound bites are done.

the Employer that *The Sun* applies in the instant case, I do not reach the conclusion urged by the Employer.

As noted by the Employer, the standard that must be applied to unit clarification proceedings involving bargaining units defined by the work performed is that “if the new employees perform job functions similar to those performed by unit employees, as defined in the unit description, [the Board] will presume that the new employees should be added to the unit unless the unit functions they perform are merely incidental to their primary work functions or are otherwise an insignificant part of their work. Once the above standard has been met, the party seeking to exclude the employees has the burden to show that the new group is sufficiently dissimilar from the unit employees so that the existing unit, including the new group, is no longer appropriate.”¹³ This presumption of inclusion can be rebutted by the party seeking exclusion by applying community of interest factors that relate to the nature and structure of the work. Thus, under either the dual-function employee analysis urged by the Petitioner, or the analysis applied to bargaining units defined by the work performed, I must look to community of interest factors to determine whether the video journalist should be included in or excluded from the unit.

The Non-Exclusive Jurisdiction Clause

The Employer maintains that while I must apply the standard described in *The Sun*, the non-exclusive jurisdiction clause of the parties’ contract essentially negates the meaningfulness of the definition of unit work. On this point, I disagree. I will apply the standard as set forth in *The Sun*, which is very specific to units such as the one in this case, where the unit is described by the work performed. I am not persuaded that the non-exclusive jurisdiction clause affects my analysis of the facts and law.¹⁴ If the non-exclusive jurisdiction clause is read as prohibiting the Union from seeking to include positions that routinely perform the work described in the definition, it “effectively would have removed any meaningful unit definition from the collective-bargaining agreement.”¹⁵ While the clause gives the Employer the right to assign work performed by the technicians to others outside the bargaining unit, it does not shield the Employer from a petition to include positions in the bargaining unit that are performing the same or similar functions. I do not read the clause as preventing the Union from seeking to include positions that have a substantial community of interest with those in the

¹³ *The Sun*, supra at 859.

¹⁴ In *Bremerton Sun Publishing Co.*, 311 NLRB 467, 470 (1993), companion case to *Antelope Valley Press*, 311 NLRB 459, 470-471 (1993), the Board held that when a unit is defined by the work performed, an employer may insist to impasse on transferring work within the unit description to other employees to perform, but an “employer may not, however, either change the unit description itself or insist that nonunit employees to whom the work is transferred will remain outside the unit. The unit placement of such employees may be determined by the Board either in an unfair labor practice proceeding or a unit clarification proceeding.”

¹⁵ *The Sun*, supra at 854.

bargaining unit. On the contrary, the clause appears only to provide that other positions can be assigned work that is also assigned to the unit employees, and the record supports the Employer's position that this does, indeed, happen. Thus, reporter Jim Smith edits his own stories every day. While nothing in the record supports the contention that Smith was assigned this work, rather than simply taking it upon himself to perform it, it is neither part of his job description, nor a requirement of his job. In this regard, the editing function that he performs is truly incidental to his job as a reporter, because it is not a required skill or a required function of his job. The video journalist, unlike the reporter who chooses to edit his own material, is required by skill and by function to perform the tasks that are part of the bargaining unit's work.

The Presumption of Inclusion

Applying *The Sun* standard, I find that the presumption that the video journalist is part of the unit applies. Thus, the video journalist, as a regular and daily part of his job, must shoot video and edit it. It is a requirement of his job that he perform these duties, and it is impossible for him to complete his required package per day without performing these technical duties. The fact that he uses a more advanced technology in terms of video and editing than other photographers and editors does not affect this presumption.¹⁶ Once the presumption applies, the employer may rebut it by showing that the new position is sufficiently dissimilar from the unit to be included.¹⁷

The Community of Interest Analysis

The Employer contends that even under a community of interest analysis, the video journalist should not be included in the unit because, among other things, he receives different wages and benefits from the unit employees. As the Board noted in *The Sun*, however, "[t]o permit reliance on factors that an employer can manipulate in an effort to exclude employees from the unit would be a 'patent form of circular reasoning.'"¹⁸ Thus, I do not place any weight on the Employer's argument that it has given the video journalist a different pay scale and benefits from those negotiated with the Union for the unit employees.

Turning to the issue of whether the video journalist has a substantial community of interest with the bargaining unit, I find that the dual function cases relied on by the Petitioner are instructional. While I must apply the standard announced in *The Sun* because the unit is functionally described, I note that once the presumption is found to apply, as I have found above, then community of interest factors are examined, as in the case of a dual-function employee. The video journalist position presents a somewhat

¹⁶ "[A] showing that technological innovation has affected unit work will not suffice to exclude new classifications performing that work from the unit unless the work has changed to such an extent that the unit would no longer make sense if it included the disputed employees." *The Sun*, supra at 859.

¹⁷ Ibid.

¹⁸ *The Sun*, supra at 859, fn. 16, citing *Oxford Chemicals, Inc.*, 286 NLRB 187, 188, fn. 5 (1987).

hybrid situation. While the video journalist performs as a reporter, the position also includes the same tasks that photographers and editors in the bargaining unit perform. While both parties assert that the amount of time the video journalist spends performing unit tasks is critical to the determination of whether he has a substantial community of interest with the unit, they urge the opposite conclusion.¹⁹ The Employer contends that the video journalist is primarily a reporter, and his bargaining unit functions are merely incidental to his job.²⁰ I do not agree. The Employer asserts that the video journalist spends only one to one and a half hours each day shooting video and editing his pieces; the Petitioner maintains that it is approximately four hours, or close to half of his regular day. The difference is accounted for by the Employer alleging that the trips to and from the shooting locations are “reporter” time. In this regard, the Employer notes that Chodak testified that he thinks about his story on the way to the location and the best way to shoot it, the questions to ask, the angle he wants to take. The Petitioner, on the other hand, contends that the time spent driving to and from the shooting locations is simply travel time, and the video journalist’s travel time is no different from that of the photographer/reporter teams.

As the Petitioner states, a news broadcast involves a “visual medium” that cannot be presented without video, and the usual way in which the packages are prepared for the broadcast is by a team. While the Employer contends that the lead person on the team is the reporter, and that the reporter’s role is more significant because he or she appears on air, it is not possible for the reporter to appear without the work of the photographer. It is possible, however, for the photographer to work without a reporter, and the record discloses that this occurs regularly.²¹ In addition, while a reporter’s day ends when he drops off the approved script with the bargaining unit editor, the video journalist performs the editing function himself in the editing suites among the other editors. While the technology he uses is different from that used by the editors, the process is similar, albeit more streamlined. Under these circumstances, I find that the video journalist enjoys a substantial community of interest with unit photographers and editors and, accordingly, I will clarify the existing unit to include the video journalist.

¹⁹ It is arguable that the time factor alone can be determinative of whether a dual-function employee belongs in the bargaining unit, without examining other community of interest factors. *Oxford Chemicals, Inc.*, supra at 187-188 (where the Board found that an employee who spent one quarter of the work day performing “work that has previously been performed by unit personnel and that would have to continue to be performed in order to carry out the normal business of the [r]espondent” was appropriately included in the unit, regardless that the unit work she performed was not as difficult as the other unit work, and regardless of her performance of non-unit work).

²⁰ No case is cited by the Employer to support its contention that the video journalist’s performance of bargaining unit work is incidental to his job as a reporter. I agree with the Union that the job is a combination of two functions, and that those functions are not only equally important to the broadcast, but difficult to separate in terms of time.

²¹ Both the video journalist and the photographers do VOs and VOSOTs, and they are performing identical functions when they do these.

CLARIFICATION OF BARGAINING UNIT

IT IS HEREBY ORDERED that the collective-bargaining unit represented by the Petitioner is clarified to include the classification of video journalist.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision and Order may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570. This request must be received by the Board in Washington by June 23, 2006. You may also file the request for review electronically. Further guidance may be found under E-Gov on the National Labor Relations Board web site: www.nlrb.gov.

/s/ Rosemary Pye

Rosemary Pye, Regional Director
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Dated at Boston, Massachusetts
this 16th day of June, 2006.